No. 87-2099

Supreme Court of the United States

October Term, 1987

JAMES LOUDERMILL
Petitioner

- vs -

CLEVELAND BOARD OF EDUCATION
Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

BERGER & FERTEL
SANFORD J. BERGER, *Counsel of Record*
ROBERT M. FERTEL
1836 Euclid Avenue, Room 305
Cleveland, Ohio 44115-2234
Phone: (216) 781-5950

Lawyers for the Petitioner, Loudermill

QUESTIONS PRESENTED

1. Is Due Process violated when a governmental decision-maker makes an order of deprivation affecting a federal constitutionally protected property or liberty interest without hearing any evidence or argument, but relies solely on the unilateral, subjective and conclusionary opinion of a subordinate governmental official who conducted the predeprivation meeting with the potential deprivee?

2. Is federal constitutional Due Process satisfied when the predeprivation notice and predeprivation hearing occur simultaneously and uninterruptedly so that the potential deprivee is in a state of shock during the predeprivation hearing: In other words, does a concurrent "sucker-punch" notice and hearing comply with federal constitutional Due Process requirements?

3. Are factual findings made by a district court "clearly erroneous" pursuant

to F.R.C.P. 52(a) when such findings are not plausible due to an irreconcilable conflict with the documentary evidence presented and with the prevailing state law?

4. Should this Court exercise its Rule 17.1(a) supervisory powers over the federal courts by establishing a "cause and prejudice" standard for the presentation of a defense which is inconsistent with prior positive factual written assertions (contained in appellate "Briefs" as contrasted with trial court "Pleadings") made by counsel for the same party: In other words, can a new defensive position be asserted for the first time after remand that comports with the new appellate decision position, but which new defense is in direct conflict with prior defensive positions represented to those appellate courts before remand?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

RULES

Supreme Court of the United States

October Term, 1987

JAMES LOUDERMILL

Petitioner

- vs -

CLEVELAND BOARD OF EDUCATION

Respondents

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For the Sixth Circuit

James Loudermill petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on April 6, 1988, in Case No. 86-4069, approving a decision and order of the United States District Court for the Northern District of Ohio.

OPINIONS BELOW

The decision of the court of appeals entered on April 6, 1988 appears in the appendix to this petition. The October 17,

1986 Memorandum and Order of the district court also appears in the appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to §1254(1). The opinion below was entered on April 6, 1988.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution states, in pertinent part:

> No state shall make or enforce any law which abridges the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law ...

STATEMENT OF THE CASE

Petitioner (Loudermill) filed his original Complaint in the local federal district court in 1981. Ten days later, he was sua sponte dismissed out by the court without the Respondent (Cleveland Board of Education or "Board") having lifted a pencil. Loudermill's appeal to the Court of Appeals was successful, and he was again successful when this Court

accepted and decided the appeal of the Board. That case being 470 U.S. 532 (1985).

Upon remand to the same district court, it now became necessary for the Board to file its first "pleading" in the form of an Answer. That Answer touched on all fours with the requirements laid down by this Court in its remand decision. However, it was a 180° turn in their prior positions wherein their counsel steadfastly represented to the Court of Appeals and this Court, in his "Briefs," that the Board had never provided Loudermill with a pretermination proceeding prior to his termination, as none was required under law.

The Board's about-face position now was that it had provided Loudermill with pretermination procedures prior to his discharge. Loudermill's timely objections on the bases of waiver, res judicate/collateral estoppel, laches and law-of-the-case were rejected by the trial court, and later by the Court of Appeals in his second appeal to them.

Upon trial, Loudermill's supervisor had total recall, and testified as to the office meeting with Loudermill prior to his firing. He also testified that he did not advise his superiors (the decision-makers) as to what Loudermill's defense was to the charge against him. As such, the supervisor became the ultimate decision-maker, although Ohio law required that only the Business Manager can terminate non-teaching employees, with subsequnt confirmation by the Board. Therefore, neither the Business Manager or the Board ever heard any evidence or argument regarding Loudermill's firing, nor were they made aware of Loudermill's side of the story.

This Court had decided in 1985 that Loudermill had a property interest in his job; and that federal constitutional due process pretermination requirements mandated notice of the charges against him, notice of the government's evidence in support thereof, and an opportunity to respond thereto.

Loudermill's testimony disclosed that the notice to him was unexpected and he was taken by surprise when he was called into his supervisor's office to immediately defend himself against charges that he lied on his employment application form when he answered "No" to the form question as to whether he had ever been convicted of a felony. In essence, Loudermill experienced mental paralysis and emotional crippling by the trauma of his supervisor's accusations.

Thereupon, his supervisor flashed a "Sheriff's Report," under Loudermill's nose, but he did not provide him with a copy, and then (acording to the supervisor) told him he now had documentary proof that Loudermill had been convicted of a felony; and, therefore, had falsified his application (which was the basis for his dismissal). Loudermill's reflexive response was to answer that he thought he had only been convicted of a misdemeanor, whereupon his supervisor said he

did not believe him as the Sheriff's Report disclosed that he had spent a considerable amount of time in jail.

His supervisor then gave him 3 or 4 days to respond. However, Loudermill's main defense was effectively precluded from consideration by his supervisor having already made up his mind, so that the additional allowance of time was meaningless.

Still in a state of shock, Loudermill went to an attorney for counsel, but by that time the 3 or 4 day period had expired and he was terminated.

Upon trial, it was disclosed that there was nothing in the Sheriff's Report that indicated Loudermill had been "convicted" of a felony, although it did disclose he had once been "charged" with a felony, but had only been sentenced to a term of imprisonment comensurate with Ohio statutory punishment for a misdemeanor.

Prior to the district court's final

order on the merits (wherein it was concluded that sufficient due process pretermination procedures had been provided to Loudermill (651 F. Supp. 92 and A28 in Appendix)), Loudermill filed a Motion For Attorney Fees, which was granted.

Following certification by the district court as a final order, the Board appealed to the Court of Appeals, which affirmed both orders of the district court on the merits as well as the attorney fees issues. 844 F.2d 304 (C.A.6,1988). A1 in Appendix.

This Petition deals with the order on the merits of Loudermill's claims for relief.

I. DUE PROCESS IS NOT SATISFIED WHEN THE ULTIMATE DECISION-MAKER ONLY HAS UNILATERAL, SUBJECTIVE AND CONCLUSIONARY INFORMATION FROM A SUBORDINATE THAT IS DEVOID OF THE POTENTIAL DEPRIVEE's EXPLANATION AS TO WHY HE SHOULD NOT BE TERMINATED.

Under Ohio law, the responsibility for terminating non-teaching employees of a city school district lies exclusively with the Business Manager with later confirmation by a Board of Education. State, ex rel. Specht v. Board of Education, 66 Ohio St.2d 178 (1981).

In the present case, Loudermill's supervisor testified concerning his alleged pretermination meeting with him, and that he did not convey Loudermill's exclamatory defense to the charges against him to any of his superiors; so that, in effect, he became the ultimate decision-maker. As such, the Businness Manager and Board had no knowledge of Loudermill's spontaneous exclamatory defense

when they decided to terminate his employment.

In the 1985 decision in this case, it was held that the purpose of pretermination Due Process procedures was to provide the affected employee with a meaningful opportunity to invoke the discretion of the decision-maker. 470 U.S., at 543 (Emphasis added).

Moreover, in Goss v. Lopez, 419 U.S. 565, 580-581, n.19 (1975), (which upheld similar Due Process requirements prior to a 10 day suspension of a high school student), it was held that such constitutional protection was intended to provide the student with an opportunity to present his side of the story to the principal (the ultimate decision-maker) in hope of persuading him to refrain from disciplinary action.

The Court of Appeals, herein, apparently perceived Loudermill's argument to be that he was entitled to a hearing before the ultimate decision-maker. Not so! Loudermill's argument was, and has always been, that the ulti-

mate decision-maker must have both sides of the story before him prior to the decision to terminate an employee.

This Court has previously held that one official may not hear evidence, while another official without any factual information before him, makes the findings and an order. Morgan v. United States, 298 U.S. 468 (1936).

Due process is only satisfied if the decision-maker bases his decision on a report, summary or findings and recommendations of the hearing officer that gives the whole picture. Jones v. Morris, 541 F. Supp. 11, 18 (S.D.,Ohio,W.D.,1981), aff'd 455 U.S. 1009 (1982).

Of interest, in Davis v. Scherer, 468 U.S. 183,205 (1984) (dissenting opinion), four members of this Court felt that an employee was denied his clearly established pretermination Due Process rights when he never had a chance to persuade the relevant decision-maker.

Also, in Hewitt v. Helms, 459 U.S. 460, 476 (1983), (wherein the interest involved was not as great as that involved herein), it was held that part of minimum Due Process equirements were notice and an opportunity for a prisoner to present his views to the official charged with deciding the issue of administrative segregation of prisoners for disciplinary reasons.

In Hewitt, although the prisoner was not entitled to a hearing before the decision-maker; nevertheless, the decision-maker was required to review the entire evidence presented to the hearing official,as well as the official's report of his investigation.

The concept running through this line of cases, as well as our justice concept of what constitutes fair-play, is that the decision-maker must have both sides of the story in order to make an informed and fair decision - but, in Loudermill's case, he was denied the opportunity to have the decision-makers

review the evidence presented to his supervisor or to review a report of the supervisor.

II. "SUCKER PUNCH" DUE PROCESS DOES NOT COMPORT WITH THE MINIMUM REQUIREMENTS OF FAIR PLAY DEMANDED BY FEDERAL DUE PROCESS PROCEDURES.

It would be shocking to think that an individual could be secretly indicted, immediately arrested and taken before a judge and told to defend himself. Even in the simplest of civil cases, there is a time delay to permit a defendant to catch his breath before trial.

Herein, Loudermill was totally incapable of defending himself when the "sucker punch" due process afforded him first knocked the wind out of him, and then demanded that he come back fighting. Coupled with his not being provided with a copy of the supposedly incriminating Sheriff's Report, he was knocked off his feet before the bell rang to start a fair fight. Perhaps a fictional

"Rocky" Balboa (the Italian Stallion) might be able to put up a valid defense thereafter, but experience and reality decree the impossibility of an average citizen acting rationally when his brains have been scrambled.

Herein, the Court of Appeals upheld the abbreviated pretermination procedures allegedly provided to Loudermill on the basis that lower federal courts have interpreted this Court's 1985 Loudermill decision to require only extremely abbreviated and limited procedures.

In Wolff v. McDonald, 418 U.S. 539,564 (1974) (which dealt with the termination of prisoners' good-time credits), it was held that prior notice of the hearing was required so that the prisoner could marshall the facts necessary for his defense to the charges against him. It was further held that a written statement by the factfinder was required in order to insure that the administrator of the prisoners acted fairly. 418

U.S., at 565.

Surely, tenured governmental employees should be entitled to the same procedural Due Process rights as prisoners! Consequently, such employees should be provided with sufficient prior notice of a pretermination hearing so that they can adequately prepare a defense to known charges against them, and that a written statement be made by the fact-finder.

In Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1,13 (1978), it was said that Due Process requires notice which is "[r]easonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (quoting Mullane v. Central Hanover Bank, 339 U.S. 306,314 (1950).)

Witness now how the various federal Circuit Court of Appeals (in their post-Loudermill opinions) have been satisfied with

concurrent "sucker-punch" notice and pre-deprivation hearings. Brasslett v. Cota, 761 F.2d 827,836 (1st Cir.,1985) (due process is satisfied when notice and opportunity to explain was provided during a one hour meeting between employee and supervisor); Buschi v. Kirven, 774 F.2d 1240,1256 (4th Cir.,1985) (due process satisfied when supervisor offered employees pretermination interviews, although they refused the interviews), and Kelly v. Smith, 764 F.2d 1412,1414 (11th Cir.,1985) (due process satisfied when notice of charge and opportunity to respond provided during a single meeting).

We are rapidly approaching a point in time when casual exchanges of "Good Morning" will satisfy due process predeprivation hearing requirements. As such, additional clarity - especially in light of the shock factor - should be given by this Court to the issue of what truly constitutes an acceptable predeprivation procedure.

III. WHEN DOCUMENTARY EVIDENCE COUPLED WITH STATE LAW CAN LEAD TO BUT ONE INESCAPEABLE CONCLUSION, THEN IT MUST PREVAIL OVER CONCLUSIONARY, INTERPRETIVE AND IRRECONCILABLE ORAL TESTIMONY TO THE CONTRARY.

The Court of Appeals adopted the findings of fact made by the district court on the basis that such findings were not "clearly erroneous" pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

However, factual findings are "clearly erroneous;" if, although there is evidence to support them, a reviewing court on examining the entire evidence is left with a definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364,395 (1948).

In truth, Loudermill's supervisor jumped to conclusions. The only basis upon which he could form an opinion (as to whether Loudermill did or did not lie on his application)

which was to exclusively rely on the Sheriff Report - which, at best, was only confusing. As stated in the 1985 Loudermill decision, the issue was not whether Loudermill had actually been convicted of a felony; but rather, what did he truly believe he had been convicted of when he filled out his employment application. What was Loudermill's state of mind when he made application?

Inasmuch as Loudermill had only been interned for 6 months (an internment commensurate with a misdemeanor conviction, whereas the minimum sentence under a felony conviction was 1 year), it just wasn't plausible for his supervisor not to believe his extemporaneous blurting out of a defense that he honestly thought he had been convicted of a misdemeanor.

It should also be noted that 11 years had expired from the time of his conviction to the time of the application date, and he was not experienced with the criminal justice

system or criminal law. Cf. Marshall v. Lonberger, 459 U.S. 422,437 (1983).

Of conclusive importance, in the administrative appeal proceedings after his termination, a Referee of the Cleveland Civil Service Commission (the only state official who heard evidence and observed Loudermill's demeanor) found that Loudermill personally thought that he had only been convicted of a misdemeanor.

Such factual finding should have been given preclusive effect by the district court. University of Tennessee v. Elliott, __U.S.__, 106 S.Ct. 3220 (1986).

IV. FACTUAL POSITIVE POSITION STATEMENTS MADE BY AN ATTORNEY ON BEHALF OF HIS CLIENT, WHETHER CONTAINED IN A BRIEF OR A PLEADING, ARE PRECLUSIVELY BINDING ON THE CLIENT.

The Federal Rules of Civil Procedure which embody rules of discovery coupled with the rules of evidence are all geared to

promote one end result - a fair trial with no Perry Mason surprises. That end result is defeated when there has been no trial, but a litigant takes one positive position stance in his appellate briefs and then does an about-face in his pleadings upon remand in order to conform with the appellate requirements set down in the appellate decision.

This Court has defined a waiver as the "[i]ntentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458,464 (1938). The failure of the Board to preserve its right to raise the new defense upon remand was such an intentional relinquishment of a known right as to constitute a waiver thereof. Such a procedure was utilized by the Parma Board of Education in the companion case of Parma Board of Education v. Donnelly, (which was accepted by this Court to be heard concurrently with the 1985 Loudermill case).

Moreover, this Court has inherent super-

visory power over the lower federal courts when this Court deems it necessary for those courts to act in a manner consistent with basic notions of fairness; Young v. United States ex rel. Vuitton et Fils SA, ___U.S.__, ___, 107 S.Ct. 2124,2138 (1987), or consistent with "[p]rinciples of right and justice" see Frazier v. Heebe, __U.S.__,__, 107 S.Ct. 2607,2611 (1987), quoting from In re Ruffalo, 390 U.S. 544,554 (1968)(White,J.,dissenting).

This Court has also expressed a reluctance to adopt rules that allow a party to withhold raising a defense until after the "main event." Granberry v. Greer, __U.S.__, ___, 107 S.Ct. 1671,1674 (1987).

It is Loudermill's contention that the presnet case is analogous to a state prisoner filing a petition in federal court for a writ of habeas corpus when he failed to raise a defense in the state courts. In such cases, this Court has established a "cause and prejudice" standard to permitting such

defense to be raised. Wainright v. Sykes, 433 U.S. 72,87 (1977).

That standard is also applicable when counsel for the prisoner fails to present such defense in a state court appeal pursuant to strategy or a tactical decision, even if the prisoner himself had not personally waived the claim. Murray v. Carrier, __U.S. __, 106 S.Ct. 2639 (1986).

Further, a client is bound by representations made by his counsel. As stated in Link v. Wabash R. Co., 370 U.S. 634 (1962):

> Any other notion would be wholly inconsistent with our system of representative litigation, in which either party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged to the attorney.' Smith v. Ayer, 101 U.S. 320,326. (Emphasis)

The district court had to determine whether or not the Board's delay in presenting its new defense violated those "fundamental concepts of justice which lie at the base of our civil and political institutions:

..., and which define the community's sense of fair play and decency." United States v. Lovasco, 431 U.S. 783,790 (1977).

Game rules should be set before the game is played: not made up as the game is played.

CONCLUSION

Loudermill, once again, respectfully urges that this Court grant his petition and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment that Court entered against him, and to remand this matter to that court for further consideration of the constitutional and procedural questions that have been presented herein.

Respectfully submitted,

BERGER & FERTEL
SANFORD J. BERGER, Counsel of Record
ROBERT M. FERTEL
1836 Euclid Ave., Room 305
Cleveland, Ohio 44115-2234
Phone: (216) 781-5950

Lawyers for the Petitioner, Loudermill

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 86-4069, 87-3435

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES LOUDERMILL, individually and on behalf of all others similarly situated,
Plaintiff-Appellant (86-4069),
Plaintiff-Appellee (87-3435),

v.

CLEVELAND BOARD OF EDUCATION,
Defendant-Appellee (86-4069),
Defendant-Appellant (87-3435).

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed April 6, 1988

Before: JONES and MILBURN, Circuit Judges; and JOINER, Senior District Judge.*

JONES, Circuit Judge. These appeals, consolidated by this court's July 24, 1987 order, stem from the district court's decisions granting James Loudermill attorneys' fees and holding that he was provided proper pretermination proce-

---

*The Honorable Charles W. Joiner, Senior District Judge for the Eastern District of Michigan, sitting by designation.

dures by the Cleveland Board of Education. For the following reasons, we affirm the district court's decisions.

I.

This case was originally filed by James Loudermill ("Loudermill") on October 27, 1981 in the United States District Court for the Northern District of Ohio against the Cleveland Board of Education ("Board") alleging violations of 42 U.S.C. Section 1983.[1] At that time, Loudermill also filed a motion to proceed *in forma pauperis* asserting that he was unable to pay the required filing fees.

On November 6, 1981, the district court, *sua sponte*, dismissed Loudermill's complaint for failure to state a claim upon which relief could be granted and denied his motion to proceed *in forma pauperis*. This was done prior to the service of Loudermill's complaint upon the Board.

On November 17, 1983, pursuant to Loudermill's appeal, this court affirmed the district court's dismissal of the part of Loudermill's complaint alleging that delays in receiving a post-termination hearing had violated his due process rights, but vacated and remanded the part of the lower court's opinion which held that no pretermination procedures were required to be given to Loudermill. *Loudermill* v. *Cleveland Board of Education*, 721 F.2d 550 (6th Cir. 1983). The United States Supreme Court affirmed this court's decision and remanded the case to the district court for further proceed-

---

[1]42 U.S.C. Section 1983, in pertinent part, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

ings. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985).

Upon remand the district court tried the issue, asserted for the first time by the Board, of whether Loudermill was given a pretermination hearing that would comply with the Supreme Court's mandate.

During the bench trial, conducted on September 11-12, 1986, testimony was given concerning the pretermination procedures provided by the Board to Loudermill. This testimony was adopted by the lower court in its findings of fact. *See Loudermill v. Cleveland Board of Education,* 651 F. Supp. 92, 93-94 (N.D. Ohio 1986). Those findings, which we do not disturb, are as follows. In September 1979, the Board hired Loudermill as a night-time security guard. On his job application, he indicated that he had never been convicted of a felony. In October 1980, as a part of a routine examination of employment records, the Board discovered that Loudermill had a felony conviction. Dishonesty by an applicant was an automatic ground for dismissal.[2]

After Thomas Roche, Loudermill's supervisor, learned of Loudermill's conviction, he summoned him to his office.[3] No

---

[2]The application which Loudermill filled out contained the following provision:

> I certify that all the statements made by me in this application are true, complete and correct to the best of my knowledge and that I am aware that any false statements will be sufficient cause for dismissal from or refusal of appointment for any position with the Cleveland Board of Education.

Thus, Loudermill was not fired for being a felon, but for his dishonesty in the application process. *See Loudermill,* 651 F. Supp. at 94.

[3]Roche was Loudermiil's supervisor, but was not the person, under Ohio law, who was empowered with the authority to discharge him. That person is the Business Manager of the Board of Education. Such a decision, however, requires the subsequent confirmation of the Board. *See State ex rel. Specht v. Board of Education,* 66 Ohio St. 2d 178, 181 (1981).

reason was given for the summons, but on or about October 27, 1980, Loudermill met with Roche.

At that meeting, Roche informed Loudermill that he knew of his conviction. Roche testified that he showed Loudermill a Cuyahoga County Sheriff's Report containing information that Loudermill had been convicted in 1968 for burglary of an inhabited dwelling and sentenced to six months in "the workhouse." He also testified that he showed Loudermill his employment application in which he had answered "No" to the following question:

> Have you ever been convicted of a crime (felony)?

Loudermill, however, testified that Roche only showed him a piece of scrap paper with handwriting on it which stated that he had been convicted of a felony.

Roche testified that he asked Loudermill to explain the apparent falsehood on the employment application. Loudermill testified that he did not recall being asked to explain his response on the application. Both men, however, testified that Loudermill stated during the meeting that *he believed* his conviction was for a misdemeanor, not a felony. Roche testified that Loudermill explained that he believed his conviction was for a misdemeanor because he was sentenced to six months in the workhouse, while Loudermill, on the other hand, testified that he did not recall being given an opportunity to further explain the conviction.

Loudermill testified that Roche informed him that he could no longer work as a night-time security guard because, as a felon, he was not permitted to carry a gun. According to Loudermill, Roche offered him a daytime job and gave him until the end of the week, which was three to four days, to decide whether to accept it, resign, or be discharged. Roche also stated that he gave Loudermill until the end of the week to produce any evidence in support of his statement that he was convicted of a misdemeanor.

Loudermill did not contact Roche after that meeting. By a letter dated November 3, 1980, the Board's Business Manager informed Loudermill of his dismissal because of dishonesty. Thereafter, Loudermill sought legal counsel.

After hearing the above testimony, the district court held that the procedures provided by the Board ensured Loudermill of a pretermination hearing and were not violative of his due process rights. This appeal followed.

Prior to the district court's decision, however, Loudermill, on September 9, 1986, filed a motion for attorneys' fees pursuant to 42 U.S.C. Section 1988.[4] Loudermill claimed "prevailing party" status under the statute. On November 13, 1986, the Board filed a brief in opposition to Loudermill's motion.

On December 8, 1986, the lower court held that Loudermill, as contemplated by the statute, was a prevailing party. This determination was based upon the fact that Loudermill's case had served as the "catalyst" which had caused the Cleveland Civil Service Commission to make changes in its rules to provide for a pretermination hearing prior to the discharge of its employees. *See* Civil Service Rule 9.20. The court, however, declined to determine the amount of fees to be awarded to Loudermill and instead postponed that determination until a later date.

On April 3, 1987, the lower court held that its order on attorney's fees was final and appealable pursuant to Fed. R. Civ. P. 54(b) and that there was no just cause for a delay

---

[4]42 U.S.C. Section 1988, in pertinent part, provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title,... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1982).

of an appeal. On May 1, 1987, the Board filed its notice of appeal.

On July 6, 1987, the Board moved this court to consolidate the hearings of the two appeals pending in this case. On July 24, 1987, that motion was granted.

II.

JURISDICTION

As an initial matter, we note that this court has jurisdiction over all issues presented to us even though the *amount* of attorneys' fees has not yet been determined.

This court recently addressed the distinction between an appeal on the merits of a case and an appeal on attorneys' fees. In *Morgan v. Union Metal Mfg.*, 757 F.2d 792 (6th Cir. 1985), this court held that while a judgment on the merits was a final judgment and could be appealed when the amount of attorneys' fees was undecided, *id.* at 794, such reasoning did not apply to a splitting of the elements of attorneys' fees. The court stated:

> [A] determination of the *amount* of attorneys' fees is not collateral to a determination of *liability* for attorneys' fees. A rule that permits a party to delay an appeal of a finding of liability for attorneys' fees until the amount of fees is determined serves the purpose of avoiding piecemeal litigation.

Id. at 795 (emphasis added and citations omitted).

This appeal, however, differs in at least one respect. Here, an appeal on the merits has been consolidated with an appeal on the determination of liability for attorneys' fees. The *Morgan* court specifically addressed this situation and held that this court has jurisdiction to decide both the merits and the attorneys' fees claim. In so doing, the court stated:

> The rule permitting a party to delay an appeal until the amount of fees is determined will not have untoward consequences in those instances in which *the party timely appeals a judgment on the merits and wishes to consolidate with it an appeal from a determination of liability for attorneys' fees when the amount of fees has not been set. In those cases, the court's jurisdiction over the appeal on the merits carries with it the authority to determine the liability for fees.*

Id. at 796 (emphasis added). Our jurisdiction in such a situation is expanded seemingly because the underlying policy considerations which would cause us to deny jurisdiction, *i.e.*, avoiding piecemeal litigation, are diminished. Thus, we have jurisdiction to decide all issues presented to us in this appeal.

STANDARD OF REVIEW

Appellate review of a district court's findings of fact is controlled by the "clearly erroneous" rule. Fed. R. Civ. P. 52(a). Consequently, a lower court's findings of fact shall not be set aside unless clearly erroneous and that standard is met "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). This court may, however, freely review the district court's legal conclusions. *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 143 (6th Cir. 1983).

A different standard, however, is employed when reviewing the lower court's award of attorneys' fees to Loudermill. That award is reviewed under an abuse of discretion standard. *See, e.g., United Slate, Tile and Composition Roofers v. G & M Roofing and Sheet Metal Co.*, 732 F.2d 495, 501 (6th Cir. 1984); *Louisville Black Police Officers Organization, Inc. v. City of Louisville*, 700 F.2d 268, 273-74 (6th Cir. 1983). This

standard is derived from the language of the governing statute, 42 U.S.C. § 1988 (1982), which provides that in federal civil rights actions "the court, *in its discretion,* may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (emphasis added).

It is pursuant to these standards that we conduct our review.

III.

A.

The first issue we decide is whether the Board may now, for the first time, assert its pretermination defense.

Loudermill asserts that the Board is barred from asserting that it provided the appropriate pretermination procedures to Loudermill since it did not raise this defense until the case was remanded by the Supreme Court to the district court for further proceedings. Loudermill raises a number of arguments, including *res judicata,* collateral estoppel and laches, in an attempt to support his claim. All of his arguments, however, run into one obstacle, *i.e.,* the procedural posture of the earlier appeals.

The earlier appeals arose when Loudermill filed his notice of appeal from the lower court's order denying him the right to proceed *in forma pauperis* and dismissing his complaint for failure to state a claim. This was done before any service of his complaint was made upon the Board and thus before any answer by the Board had been filed. The record, presented to this court and the Supreme Court, contained only Loudermill's complaint, the district court's denial of his motion to proceed *in forma pauperis* and the district court's opinion holding that Loudermill's complaint failed to state a claim upon which relief could be granted. Therefore, the Board argues, since *both parties* are limited on appeal to what is contained in the record, and since the record contained

no allegations relating to any potential defense, *i.e.*, that a pretermination hearing had been provided, the remand by the Supreme Court was its first opportunity to present its defense.

In other words, the Board argues that the first set of appeals related to whether Loudermill had *alleged* in his complaint a ground upon which relief could be granted, while the remand to the district court, and thus this appeal, concerns whether Loudermill can *prove*, now that we know he has stated a claim, that he received no pretermination hearing. We find this argument convincing even though Loudermill presents several arguments to the contrary.

Loudermill first points out that the Board could have preserved its pretermination defense in its briefs to this court and the Supreme Court. While such a reservation might have prevented this appeal, the lack thereof is certainly not a bar to the Board's ability to now raise its defense. Loudermill has cited no principle or rule of law which would mandate such a result.

Loudermill's second request that the Board be bound by its statements in its briefs which appear to concede that a pretermination hearing did not occur is also without merit. Loudermill cites Ohio law for the proposition that parties are bound by their pleadings. However, briefs prepared for oral argument are not pleadings. *See* Fed. R. Civ. P. 7. As such, the principle of law cited by Loudermill is inapplicable.

Loudermill also contends that *res judicata* and collateral estoppel prevent the Board from now raising this defense. He claims that this defense should have been first raised in 1981 when both parties were before the Cleveland Civil Service Commission. The Board, however, at that level was successful in its claim that due process does not require a pretermination hearing. As such, the Board was certainly not bound to bring up an alternative ground on which its success could

be based. Thus, the Board is not now barred from raising a new defense under this argument.

Loudermill claims that the Board is bound by the "law of the case." That is, because this court and the Supreme Court decided the earlier appeals upon the fact that there *was no pretermination hearing,* it is now too late to assert such a defense. The procedural posture of the case, however, *i.e.,* a dismissal *sua sponte* by the district court for failure to state a claim upon which relief could be granted, prevents this argument from being accepted.

In reviewing the language of this court and the Supreme Court, only the issue of whether a claim had been stated for which relief could be granted was decided by these courts, not the issue of whether Loudermill had actually proven that he had been denied such a hearing. Indeed, the Supreme Court, in affirming this court's decision, stated:

> *Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim.* The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 548 (1985) (emphasis added). Thus, this argument is also without merit.

Finally, Loudermill argues that laches bars the Board from now raising its defense. In Ohio, laches constitutes "an omission to assert a right for an *unreasonable* and *unexplained* length of time. . . ." *Connin v. Bailey,* 15 Ohio St. 3d 34, 35 (1984) (emphasis added). The party asserting such a claim must show both a delay in the opposition in asserting the new claim plus *actual prejudice* caused by the delay. *Id.*

Although this is Loudermill's strongest argument, it fails because of Loudermill's failure to demonstrate prejudice.

Loudermill was not prejudiced by the Board's failure to preserve its defense because of the procedural posture of the earlier appeals and the applicable standard of review. The earlier appeals arose in the nature of a *sua sponte* dismissal for failure to state a claim. Pursuant to our standard of review with such a dismissal, "all factual allegations and permissible inferences" in the complaint are accepted as true. *Kent v. Johnson,* 821 F.2d 1220, 1223 (6th Cir. 1987). Thus, to determine whether or not Loudermill had stated a claim, all of his allegations, *i.e.,* no pretermination hearing, would have been accepted as true. As such, Loudermill did not rely on the Board's failure to preserve the issue nor is there any prejudice to him. Rather, the issues presented and decided by this court and the Supreme Court were dictated by the record and the district court's *sua sponte* dismissal. Thus, this argument, as Loudermill's other arguments, is without merit.

Therefore, for all of the above reasons, the district court was correct in holding that the Board could assert its pretermination defense. We now review whether the lower court erred in holding that Loudermill's due process rights had been adequately protected by the Board.

B.

The applicable substantive law is settled. It is clearly established that Loudermill, as a tenured public employee, was entitled to a pretermination hearing. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 545 (1985). Such a hearing, *though necessary,* "need not be elaborate." *Id.* In fact, the employee is *only* entitled to:

> [i] oral or written notice of the charges against him;
>
> [ii] an explanation of the employer's evidence; and
>
> [iii] an opportunity to present his side of the story.

Id. at 546.

In this case, an onerous burden is not placed upon the employer by these requirements. Indeed, the Supreme Court has stated that where state law provides for a full administrative post-termination hearing and judicial review, the pretermination hearing:

> need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

Id. at 545-46. The Supreme Court, in *Loudermill,* held that to require more than this "prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546.

Thus, the issue is whether the meeting between Loudermill and Roche gave Loudermill adequate notice of the charges against him and an opportunity to respond thereto. In examining the facts of this case, it is clear that these requirements were satisfied.

During the meeting between Roche and Loudermill, Roche informed Loudermill that a falsehood had been discovered on his application. This falsehood placed Loudermill's honesty at issue and made him subject to immediate dismissal.[5] Roche showed Loudermill his application where he had stated he had never been convicted of a felony. He also showed him the sheriff's report which stated he was convicted of a felony. At that time, Loudermill attempted to explain the discrepancy in the documents to Roche. Roche, apparently unsatisfied with his explanation, gave Loudermill four or five extra days to supplement his explanation. Loudermill,

---

[5]*See supra* footnote 2.

however, chose not to do so. Rather, he consulted an attorney and initiated his lawsuit.

In cases such as this, it is tempting to extend the Supreme Court's enunciated requirements of procedural due process to provide more process than the Court has set forth. Such temptation prompted Justice Marshall to write a separate opinion in the Court's *Loudermill* decision. *See Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 548 (1985) (Marshall, J., concurring in Part II and in the judgment). In so doing, he stated:

> I write separately, however, to reaffirm my belief that public employees who may be discharged only for cause are entitled, under the Due Process Clause of the Fourteenth Amendment, to more than respondents sought in this case. I continue to believe that *before the decision is made to terminate an employee's wages,* the employee is entitled to an opportunity to test the strength of the evidence 'by confronting and cross-examining adverse witnesses and by presenting witnesses on [their] own behalf, whenever there are substantial disputes in testimonial evidence,'. . . . Because the Court suggests that even in this situation due process requires *no more than notice and an opportunity to be heard before wages are cut off,* I am not able to join the Court's opinion in its entirety.

(emphasis in original and added and citation omitted). Justice Marshall also stated:

> [I]n requiring *only* that the employee have an opportunity to respond before his wages are cut off, without affording him any meaningful chance to present a defense, the Court is willing to accept an impermissibly high risk of error with respect to a deprivation that is substantial.

Loudermill, 470 U.S. at 550 (Marshall, J.) (emphasis added).

The majority of the Court, however, did not expand procedural due process to encompass such reasoning. Under the narrower view of the Court, it is clear that Loudermill's procedural due process rights were not violated by the Board's pretermination procedures.

Loudermill argues, however, that because his meeting was with Roche, his supervisor, but one not with the authority under Ohio law to actually discharge him, his notice and opportunity to respond were not meaningful. He points to the fact that Roche did not convey his remarks to the "ultimate decision-maker," *i.e.,* the Business Manager and the Board, but instead presented only his conclusions on the matter. Thus, he contends that he was actually terminated by Roche.

While Loudermill's argument has a nice ring, such an argument has not been accepted by the courts. Indeed, courts construing the Supreme Court's language in *Loudermill* have required only the barest of a pretermination procedure, especially when an elaborate post-termination procedure is in place. *See, e.g., Buschi v. Kirven,* 775 F.2d 1240, 1256 (4th Cir. 1985); *Kelly v. Smith,* 764 F.2d 1412, 1414 (11th Cir. 1985); *Brasslett v. Cota,* 761 F.2d 827, 836 (lst Cir. 1985). This court has also decided such questions of procedural due process requiring only the minimum of procedures. *See Gurish v. McFaul,* 801 F.2d 225, 227-28 (6th Cir. 1986) (indicating that an interview prior to termination by one not the ultimate decision-maker is enough to satisfy due process); *Lee v. Western Reserve Psychiatric Habilitation Center,* 747 F.2d 1062, 1068-69 (6th Cir. 1984) (all that is required is an "abbreviated opportunity to respond," and, under this standard, a letter informing one of the charges and an interview to explain them is sufficient). *See also Deryck v. Akron City School Dist.,* 633 F. Supp. 1180, 1183 (N.D. Ohio 1986), *aff'd without opinion,* 820 F.2d 405 (6th Cir. 1987).

While it might be tempting to make this test harder and require that a meeting be with the one actually empowered

with the authority to fire, the courts have not construed procedural due process to merit such a requirement.

Since Loudermill received adequate notice of the charges against him, saw the Board's evidence, and was offered several days to respond, the district court correctly concluded that Loudermill received a pretermination hearing which satisfied the requirements of procedural due process.

IV.

The district court was also correct in granting Loudermill attorneys' fees as a prevailing party.

> When a court is asked to award attorney's fees in a civil rights case, the determinative issue is whether the applicant is the 'prevailing party' in the action. This is the only standard contained in . . . the [governing] statute . . . . Decisions under § 1988 have made it clear that it is not necessary for a party to secure a judgment in his favor in order to be a prevailing party. If a party achieves a substantial portion of the relief sought or succeeds on a significant issue as the result of an agreed settlement or a consent decree this is sufficient to support an award of attorney's fees. . . . *A plaintiff may also qualify as the prevailing party if his lawsuit is found to be the 'catalyst' which causes the defendant to make significant changes in its past practices, though no direct relief is obtained.*

Othen v. Ann Arbor School Board, 699 F.2d 309, 313 (6th Cir. 1983) (emphasis added and citations omitted). *See also Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983).

The Board argues that Loudermill did not achieve any of the benefits he sought in bringing his suit. It is true that he was not reinstated as a night-time security guard, that he was not awarded back pay or compensatory damages, and that

his request that Ohio Rev. Code Section 124.34 be declared unconstitutional was denied. The Board also points out that a class action was never certified and that Loudermill has not even demonstrated that his individual rights were violated.

While all of the above may be true, it is clear that the Supreme Court's decision in *Cleveland Board of Education v. Loudermill,* 470 US. 532 (1985), has been heralded as a landmark case in setting forth the procedural due process rights of tenured public employees. Thus, we must determine how, and to what extent, that decision bears upon Loudermill's status as a prevailing party.

The Board argues that the Supreme Court in *Loudermill* did not establish any new law, but only reiterated a well-established principle. Such an argument is clearly wrong. The Supreme Court does not hear and decide cases in the absence of necessity. To merely reiterate an established principle of law would not present a reason for the grant of a writ of certiorari. Indeed, the Court in *Loudermill* established exactly *what kind* of pretermination hearing must be provided to tenured public employees by balancing the *Mathews v. Eldridge* factors. *Mathews v. Eldridge,* 424 U.S. 319, 336 (1976). This was precisely the question left open by the Court in its earlier cases. Thus, the Board's argument that a new principle of law was not established by the *Loudermill* decision is clearly erroneous.

The lower court granted attorneys' fees to Loudermill pursuant to the theory that his lawsuit served as a catalyst for changes in past practices of the Cleveland Civil Service Commission and the Board.[6] The lower court, in granting fees, stated:

---

[6]In its brief the Board argues that it made no changes in its past practices as a result of this lawsuit, but if changes were made, the Cleve-

> [B]ecause of his [Loudermill's] lawsuit, the United States Supreme Court held that a pretermination hearing must be provided to an employee who has a property interest in his employment. *Subsequently, the Commission* [Cleveland Civil Service Commission] *amended its rules to provide for a pretermination hearing.* The court concludes that Loudermill's lawsuit served as a catalyst for this amendment. Further, the amendment resulted in a significant change because, before the amendment, a civil service employee was limited to posttermination [sic] review of his discharge.

J. App. at 45-46 (emphasis in original).

The Board asserts that Loudermill cannot show the required causal relationship, *i.e.*, that his lawsuit is the factor that caused the change in the Commission's rules. The Board, in asserting this argument, falls back on the argument that the *Loudermill* decision established no new precedent, but only clarified past case law. Thus, the Board asserts, the Supreme Court's grant of a pretermination hearing is more closely akin to past precedent rather than to this specific claimant, *i.e.*, Loudermill.

As pointed out by Loudermill, he succeeded in establishing that procedural due process requires a pretermination hearing for all tenured public employees in Ohio. He correctly states that this was not the law in Ohio prior to this decision.

---

land Civil Service Commission, a non-party, made such changes. Thus, the Board claims it should not be responsible for attorneys' fees as it has always provided pretermination hearings to its employees. Such an argument is a red herring and without merit. The Board has tenured public employees in its service and its rules with regard to those employees were the same as those used by the Commission. As such, the Board's past practices have been drastically changed by the *Loudermill* lawsuit.

Furthermore, although this case was never certified as a class action, the decision of the Supreme Court granted *relief* to Loudermill's class, over 16 million tenured governmental employees, and this relief was the type originally sought by Loudermill.

After *Loudermill,* as his attorneys demonstrated in the lower court, the Cleveland Civil Service Commission changed its rules to comply with the procedures mandated by the Supreme Court. As such, Loudermill has established a causal relationship between his lawsuit and the change of pretermination procedures as required by law. Because of this change, it was not an abuse of discretion for the district court to hold that he was the "catalyst" in procuring this change and thus a "prevailing party" even though he garnered no individual relief.

In sum, all of the Board's arguments ignore the effect that the Supreme Court's landmark decision in *Loudermill* has had on this area of federal constitutional rights. As such, the lower court did not abuse its discretion in holding Loudermill to be a "prevailing party" and thereby granting him attorneys' fees.

Therefore, for all of the foregoing reasons, the district court's judgments, in their entirety, are hereby **AFFIRMED.**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

(Filed on October 17, 1986)

JAMES LOUDERMILL,	()	CASE NO. C81-2132
Plaintiff,	()	Judge John M. Manos
v.	()	
CLEVELAND BOARD OF EDUCATION,	()	ORDER
Defendant.	()	

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the court finds for the defendant.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(Filed on October 17, 1986)

JAMES LOUDERMILL,	()	CASE NO. C81-2132
Plaintiff,	()	Judge John M. Manos
v.	()	
	()	MEMORANDUM OF OPINION
CLEVELAND BOARD OF EDUCATION,	()	
Defendant.	()	

On October 27, 1981, James Loudermill, plaintiff, filed the above-captioned case against the Cleveland Board of Education ("Board"),[1] alleging violations of 42 U.S.C. §1983.[2] Jurisdiction is invoked under 28 U.S.C. §1343(3) and (4).[3] On November 6, 1981, this court dismissed the complaint for failure to state a claim on which relief could be granted. On November 17, 1983, the Sixth Circuit Court of Appeals affirmed the court's dismissal of "that part of [the complaint] which alleged that delays in post-termination hearings violated [Loudermill's]

due process rights" but vacated and remanded "that part of the district court's judgment that dismissed the pre-termination procedural due process [claim]." 721 F.2d 550,564 (1983). The United States Supreme Court affirmed the Sixth Circuit's decision and remanded for further proceedings. 105 S.Ct. 1487,1496 (1985). On September 11 and 12, 1986, this court tried the issue of whether Loudermill was given a pretermination hearing and, for the reasons stated below, finds that the Board had given Loudermill a pretermination hearing.

I.

In September, 1979, the Board hired Loudermill as a nighttime security guard. On his job application, he indicated that he had never been convicted of a felony. Exhibit I. In October, 1980, as part of a routine examination of employment records, the Board discovered that he had a felony conviction.

After Thomas Roche, Loudermill's super-

visor, learned of Loudermill's conviction, he summoned him to his office. No reason was given for the summons. On or about October 27, 1980, Loudermill met with Roche.

At the meeting, Roche informed Loudermill of Loudermill's conviction. Roche testified that he showed him a Cuyahoga County Sheriff's Report, containing information that Loudermill had been indicted in 1968 for burglary of an inhabited dwelling and sentenced to six months in the workhouse, and Loudermill's employment application in which he had answered "No" to the question, "Have you ever been convicted of a crime (felony)?" Exhibits I and K. Loudermill testified that Roche showed him only a piece of scrap paper with handwriting on it, which stated that he had been convicted of a felony. Roche testified that he asked Loudermill to explain the apparent falsehood on the employment application. Loudermill testified that he did not recall being asked to explain his response on

his application.[4] Both Loudermill and Roche testified that Loudermill stated during the meeting that he believed his conviction was for a misdemeanor, not a felony. Roche testified that Loudermill explained that he believed his conviction was for a misdemeanor because he was only sentenced to six months in the workhouse. Loudermill, on the other hand, testified that he did not recall being given an opportunity to explain his conviction.

Loudermill testified that Roche informed him that he could no longer work as a nighttime security guard because, as a felon, he was not permitted to carry a gun. According to Loudermill, Roche offered him a daytime job and gave him until the end of the week[5] to decide whether to accept it, resign, or be discharged. Roche testified that he gave Loudermill until the end of the week to produce any evidence in support of his statement that he was convicted of a misdemeanor.

Roche further testified that he told Loudermill he might be able to find some other job for him.

Loudermill did not contact Roche after that meeting.[6] By letter dated November 3, 1980, the Board's business manager informed Loudermill of his dismissal because of dishonesty. Exhibit 1.

II.

As a tenured employee, Loudermill was entitled to a pretermination hearing. Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487,1495 (1985). The pretermination hearing "need not be elaborate," id., but must give the employee "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. If state law provides for a full administrative posttermination hearing and judicial review, the pretermination hearing need serve only as "an initial check against mistaken

decisions - essentially, a determination of whether there are reasonable grounds to beleive that the charges against the employee are true and support the proposed action." Id

Since Ohio law provides for a full post-termination hearing, see Ohio Rev. Code §124.34; Loudermill, 105 S.Ct. at 1496, all that need be determined is whether the meeting between Loudermill and Roche gave Loudermill adequate notice of the charges against him and an opportunity to respond.

Due process requires notice which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1,13, 98 S.Ct. 1554,1562 (1978) (quoting Mullane v. Central Hanover Bank, 339 U.S. 306,314, 70 S.Ct. 652,657 (1950). The evidence adduced at trial established that Loudermill had adequate notice of the charges

against him. At their meeting, Roche informed Loudermill that a falsehood had been discovered on his application. This was sufficient notice to Loudermill that his honesty was at issue. Further the application included the statement

> I certifiy that all the statements made by me in this application are true, complete and correct to the best of my knowledge and that I am aware that any false statements will be sufficient cause for dismissal from or refusal of appointment for any position with the Cleveland Board of Education.

Exhibit I. Roche showed Loudermill this document and the sheriff's report. The contents of these documents served as additional notice to Loudermill that his honesty was questioned.

During the meeting, Loudermill was afforded an opportunity to explain, and he did. Further, he was given 4 or 5 days to expand on or to supplement his explanation. He did not do so. The time provided to Loudermill during and after the meeting with

Roche constituted a sufficient opportunity to respond to the charge.

Due process requires only that the pre-termination hearing provide an employee with notice of the charges against him and an opportunity to respond. Loudermill, 105 S.Ct. at 1496. Courts interpreting this requirement have held that due process is satisfied even when the opportunity to respond occurs immediately after notice of the charges. See, e.g. Brasslett v. Cota, 761 F.2d 827,836 (1st Cir. 1985) (due process satisfied when notice and opportunity to explain provided during a one hour meeting between employee and supervisor); Buschi v. Kirven, 775 F.2d 1240,1256 (4th Cir. 1985) (due process satisfied when supervisor offered employees pretermination interviews, although they refused the interviews); Kelly v. Smith, 764 F.2d 1412,1414 (11th Cir. 1985) (due process satisfied when notice of charge and opportunity to respond provided during a single meeting); see also Gurish v. McFaul,

No. 84-3036, slip. op. at 5 (6th Cir. Sept. 15, 1986). Since Loudermill received adequate notice of the charge against him, saw the Board's evidence, and was offered several days to respond, the court concludes that Loudermill received a pretermination hearing which satisfied the requirements of due process.

Accordingly, the court finds for the defendant.[7]

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

---

1. Loudermill originally named additional defendants, but, on September 12, 1985, he dismissed his claims against them.

2. 42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. 28 U.S.C. §1343 provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States ...;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights ...

4. On January 29, 1981, Loudermill testified at his Civil Service Commission Hearing that Roche stated, "You falsified your application."

5. Loudermill testified that his conversation with Roche took place on a Monday; Roche testified that the conversation occurred on a Monday or Tuesday. Thus Loudermill had 4 or 5 days to respond.

6. Loudermill testified that he consulted an attorney immediately after meeting with Roche.

7. During the trial, plaintiff argued that this was a class action. This case was never certified as a class action during the original proceedings in this court. Further, the Supreme Court did not address the class certification issue. Accordingly, the court declines to consider the class certification argument raised at trial.